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Chairman: MR. LAMPTEY (Ghana)

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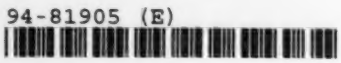

The meeting was called to order at 3.15 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10, A/49/355)

1. Mr. CHALY (Ukraine) said that the draft statute for an international criminal court offered for the first time in history a real possibility of establishing a permanent international criminal jurisdiction. The principle of inevitability of punishment thus formally proclaimed should contribute to the effective prevention of the crimes which were of concern to the international community.

2. His delegation saw the draft statute drawn up by the International Law Commission as a balanced document which took into account the points of principle made by States at previous sessions of the Sixth Committee. Article 21 of the draft found a felicitous solution to the serious problem of non-contestation of the sovereign rights of States in such a delicate area of their national jurisdiction as the administration of criminal justice. It nevertheless appeared necessary to complete the article by adding to paragraph 1 (b) a subparagraph (iii) covering cases in which the jurisdiction of the court was also accepted by the State of the accused's nationality.

3. His delegation shared the view of the International Law Commission that the statute should be attached to a treaty on the basis of which States would establish the court. The structure for the treaty proposed by the International Law Commission was on the whole acceptable. It needed, however, to be supplemented by a number of basic rules. In particular, consideration should be given to the idea that the United Nations itself could become a party to such a treaty, which would make it direct participant in the establishment of the court. It was equally essential that the treaty should provide that the establishment of the International Criminal Court did not absolve States of their international legal responsibility for crimes against the peace and security of mankind committed by individuals in positions of high office in their country. Furthermore, his delegation believed that the court should be financed entirely by the United Nations, since that would make it possible to expand the circle of States parties to the treaty which was to accompany the statute.

4. To enable the statute of the court to adapt to the dynamic evolution of international life, provision should be made for a flexible review or modification procedure. It did not appear desirable to establish a five-year moratorium for revision of the statute, as proposed by the International Law Commission. A number of relevant international instruments were currently in the final phase of their preparation, for example the convention dealing with the safety and security of United Nations and associated personnel, which could enter into force in the near future. If a five-year moratorium applied, it could not be included in the list of treaties referred to in article 20 (e) of the draft statute. It would moreover be desirable to take a more flexible

position regarding reservations to the statute, for incorporation of its provisions into national law was bound to raise fundamental issues of constitutional law.

5. Furthermore, the proposal of the International Law Commission to authorize only reservations of a limited nature risked considerably reducing the number of States parties to the future court. The treaty to which the draft statute would be attached was a fundamental element in the establishment of a treaty-based international criminal court. Accordingly, the issue should be approached very seriously, and that would undeniably require States to devote to it additional efforts and resources. In that context, the idea of establishment of a preparatory committee or working group to be responsible for drawing up a draft treaty to be submitted at the same time as the draft statute to an international conference of plenipotentiaries at which the work on the adoption of those instruments could be brought to a conclusion appeared acceptable. Nevertheless, it should not be permissible for that preparatory committee or working group to reopen debate on the draft statute submitted by the International Law Commission to the Sixth Committee, for that would risk indefinitely postponing the holding of a final diplomatic conference on the establishment of an international criminal court.

6. Mr. LAING (Belize), referring to the draft statute for an international criminal court, said that Part 1 (Establishment of the court) was generally acceptable. Article 2 (Relationship of the court to the United Nations) would have to be discussed in the light of the extensive commentary on it made by the International Law Commission and of appendix III. Part 2 (Composition and administration of the court) was also generally satisfactory, although article 6 would probably have to be amended one day in order to provide for a larger number of judges. Part 3 (Jurisdiction of the court) and Part 4 (Investigation and prosecution) were also generally acceptable.

7. With regard to Part 5, his delegation felt it necessary to specify, with respect to article 33 (Applicable law), that it interpreted paragraph (b) as referring exclusively to international law norms, and it was therefore unable to subscribe to the comment made by the International Law Commission in paragraph 2 of the commentary on the article, to the effect that the principles and rules there cited included the whole corpus of national law. Even if paragraph (b) had referred to "general principles of law" as opposed to "general principles of international law", the reference would have covered only the most general principles, and certainly not the whole corpus of national law. To obtain the latter result, the paragraph would have to be significantly rewritten.

8. Article 40 rightly placed on the Prosecutor the onus of establishing guilt beyond reasonable doubt. It might nevertheless be expected, in the era of instant global broadcasting, that courts would apply article 44, paragraph 4, vigorously and liberally, and that there need be no proof for facts of common knowledge.

9. With regard to article 47 (Applicable penalties), his delegation accepted the decision of the International Law Commission not to authorize the court to impose the death penalty. Nevertheless, vigorous application of penalties such as the fines provided for in article 47, paragraph 3, was to be expected. In addition, there should be authorized the transfer of portions of fines to any State in which a convicted person was serving a sentence of imprisonment.

10. His delegation was generally comfortable with the provisions of Part 6 (Appeal and review) and Part 7 (International cooperation and judicial assistance). Regarding Part 8 (Enforcement), it proposed the inclusion in article 59 of a provision for sentences to be enforced through levies against assets in States parties.

11. Turning to the law of non-navigational uses of international watercourses, he said he was generally satisfied with Part I of the draft article submitted by the International Law Commission, although he nevertheless considered that article 3, paragraph 1, on watercourse agreements, would require some reworking.

12. Part II (General principles) proposed the governing concept of equitable utilization of international watercourses. Despite the substantial data in support of its wide acceptance, however, equity was not a well-developed doctrine of international law, and was a relative stranger to several legal systems. It would be useful to supplement the concept with other established norms. The word "reasonable", also proposed as a standard, suffered on grounds of its imprecision.

13. Undoubtedly, useful inspiration could be found in instruments of international economic law or in the legislation of major economic actors such as the United States of America. Their provisions were based on concepts of equal access or non-discrimination, notably in the form of the most-favoured-nation clause. Moreover, that trend to replace equity by non-discrimination and equal access was also to be found in specific trade regulatory formulae such as those relating to dumping and subsidies, and even in regulations under national law proscribing unfair trading. Those concepts were also present in treaties on investments. Furthermore, instruments dealing with the navigational use of international waterways had always explicitly stated the principle of equal access and non-discrimination. In fact, the commentary by the International Law Commission on article 5 made it apparent that the Commission was fully aware of the presence of those ideas in many international agreements.

14. The international conference which his delegation hoped would be convened on the question should consider the possibility of adding to the equitable and reasonable utilization rule the criterion of equal access and non-discrimination. That latter standard might already be intimated in article 17, paragraph 2 ("reasonable regard to the rights and legitimate interests of the other State"). As it stood, article 5 provided for a possible measure of equality, depending on the discretion of the decision maker. The additional standard proposed by his delegation, providing merely for formal equality, might be of more frequent service, especially since it was supported

by a vast number of precedents drawn from all the known sources of international law.

15. His delegation was pleased that the Commission had incorporated the international economic legal principle of the duty of international cooperation in articles 6 and 8, and by inference in other provisions of the draft articles. He suggested that the proposed international conference should take cognizance of the probable full establishment of that principle in international law.

16. Paragraph 2 of article 7 (Obligation not to cause significant harm) recognized the obligation to consult with the State that had suffered significant harm, despite the exercise of due diligence, over the question of adjustments designed to eliminate or mitigate any such harm caused and the question of compensation. In paragraph 18 of the commentary to that article, the Commission had stated that the payment of compensation was expressly recognized as a means of balancing the equities in appropriate cases, in connection, inter alia, with the extent to which adjustments were economically viable. His delegation did not see how that conclusion could be drawn from the present wording of article 7, which was not so categorical on many aspects of the question of compensation. If the principle of "polluter pays" or "user pays" or similar concepts were to be adopted, it would be better to do so more directly. The same applied to the notion of economic viability.

17. With regard to part III (Planned measures), his delegation thought that the text of article 19 was incomplete because of the somewhat arcane nature of the phenomena with which it dealt. Those phenomena had to do with the rarely analysed concept of "exceptions clauses", many of which had been synthesized and consolidated in the General Agreement on Tariffs and Trade, and repeated in many GATT-sponsored agreements. Those models should be used to reword article 19, paragraph 1, dealing with what might be called "legitimate" discrimination.

18. Mr. ROBINSON (Jamaica) said that the draft statute for an international criminal court satisfied the needs of two groups of States whose interests were divergent and hard to reconcile. The first group was composed of small States that wished to see an international criminal court established to judge crimes, particularly drug-related crimes, which transcended national boundaries. The other group saw the court chiefly as an instrument to combat genocide, war crimes, crimes against humanity and even aggression. The tension between those two interests was evident in the preamble to the draft statute, which emphasized both that the court was intended to exercise jurisdiction only over the most serious crimes, and that it was intended to be complementary to national criminal justice systems. Surely, provisions of that kind dealing with the jurisdiction of the court should appear in the operative section of the draft rather than in the preamble. Article 3 (Seat of the court) and article 32 (Place of trial) generally constituted a good compromise that satisfied the interest of small States in having a court that would relieve them of the burden of a trial, while retaining the possibility of having some trials and imprisonment take place in their territory in certain cases.

19. The difficult question of the qualifications of the judges (art. 6) was handled well, although it was regrettable that a rigid distinction was drawn between judges with criminal trial experience and judges with recognized competence in international law. Ideally, every judge on the court should have both qualifications in order to discharge his duties properly.

20. The provisions of article 9, paragraph 1, concerning the constitution of an appeals chamber reflected the presumption that an appeals judge required more competence in international law than criminal trial experience, a fallacious presumption, since it was quite possible that an appeal might not raise any issue of international law and might deal solely with an issue requiring criminal trial experience, such as an assessment of the weight of evidence adduced at the trial. Conversely, the provision of article 9, paragraph 5, stipulating that the judges of the trial chamber required more criminal trial experience than competence in international law, was also based on an incorrect premise. In most cases, the interrelatedness of the issues involved belied the dichotomy on which articles 6 and 9 were based. Article 6 did not prohibit a judge from possessing both qualifications, but it should be made less categorical in establishing two categories of qualifications, because, despite what the Commission said in its commentary, the current text would prompt States to nominate persons possessing just one of the two qualities rather than both.

21. His delegation thought it was regrettable that article 10 and the related commentary appeared to make civil servants ineligible for election to the court. Although there was a precedent for the practice in other international bodies, it was regrettable that the draft statute had adopted that approach, because it would prevent the court from drawing on a vast pool of qualified persons. Moreover, in many countries, civil servants were not politicians and were only technically attached to the executive branch.

22. Articles 19 and 24 dealt with the very difficult question of rules of evidence. The draft statute took the approach of specifying only three. The major task of elaborating those rules was thus left to the discretion of the court. The crux of the problem was whether rules of evidence should be considered part of substantive law. Article 33 set forth precise norms concerning the substantive law that the court should apply. If rules of evidence were part of substantive law, then in principle article 33 should govern the making of those rules, which would be based both on international practice and on national law, where that was appropriate. Thus, although rules of evidence would generally be subject to the approval of States parties, it might be useful for the statute to provide that in formulating those rules, the court should be guided by the provisions of article 33. Of course, another view might very well be that such a provision was unnecessary, since, on the assumption that rules of evidence constituted substantive law, article 33 would apply in any event.

23. Article 19, paragraph 3, established a summary procedure whereby rules for the functioning of the court would be transmitted to the States parties and might be confirmed by the presidency unless a majority of the States parties had indicated their objections within six months. In principle, the rules of the

court, including the rules of evidence, should be approved by the States parties. In paragraph 3 of its commentary to the article, the Commission explained that the summary procedure, which was faster, would be used for minor amendments, in particular changes not raising issues of general principle. That was an important reservation which his delegation felt should not be relegated to the commentary, but should be reflected in the text of article 19, paragraph 3, itself.

24. As to the court's jurisdiction, his delegation felt that the approach whereby States would "opt in" to the jurisdiction of the court in respect of certain crimes was the best compromise achievable under present circumstances. It commended the Commission for dropping the distinction it had made in its previous report between treaties which defined crimes as international crimes and treaties which merely provided for the suppression of undesirable conduct constituting crimes under national law. It also supported the movement away from a mere reference to crimes under international law. It was generally in support of the approach taken in article 20, with the proviso that it was not the job of the Commission to codify crimes under international law, and therefore that the commentary should not have indicated that the crimes listed under article 20, subparagraphs (a) to (d), were crimes under international law. One might infer that crimes not so listed were not crimes under international law. His delegation believed that apartheid was a crime under international law, and would regard as unacceptable any reading of article 20 and the commentary thereto that might support a contrary interpretation.

25. Although his delegation supported the basic structure for the court proposed by the Commission, it believed that the first real attempt to establish an international criminal court must proceed cautiously. Care must be taken not to breach the fundamental principles of consent and sovereignty. Since international criminal law was not a fully developed area and since the statute of the court was certain to have an impact on national legal systems, the statute should be established on a consensual basis, which should be reflected in all its provisions. For that reason, his delegation had reservations about the inherent jurisdiction that the statute gave the court over the crime of genocide. To accept the interpretation given by paragraph 5 of the commentary to article 20 would be to admit three exceptions to the preconditions to the exercise of jurisdiction stipulated in article 21, paragraph 1 (b), and article 25, paragraph 2: neither the State that had lodged the complaint, nor the State which had custody of the suspect, nor the State on whose territory the act was committed need have accepted the jurisdiction of the court over the crime of genocide.

26. The present state of international criminal law did not warrant that approach. Although the crime of genocide was a question of topical relevance today, one might well ask on what basis the preconditions to the exercise of jurisdiction set forth in article 21, paragraph 1 (b), and article 25, paragraph 2, could be dispensed with in relation to genocide but not to the other crimes mentioned under article 20, subparagraphs (b) to (d), which were also supposedly crimes under general international law. Moreover, it was likely that the court's exercise of inherent jurisdiction over the crime of genocide could in

practice be achieved through the normal application of the preconditions for acceptance of its jurisdiction set forth in the above-mentioned articles. There were 110 States parties to the Convention against genocide, and it was likely that most of them would become parties to the statute and would accept the jurisdiction of the court over the crime of genocide.

27. The idea that the exercise of the jurisdiction of the court with respect to a crime should be preconditioned on the acceptance of that jurisdiction by the State which had custody of the suspect in that crime raised the question of when a State had custody sufficient to ground the jurisdiction of the court. His delegation feared that the statute might be used to sanction (or be interpreted as sanctioning) the acquisition of custody through means that could very well violate the fundamental principles of international law relative to sovereignty and territorial integrity. The statute should acknowledge as a basic principle that custody should not be acquired in breach of international law. Thus the phrase "in accordance with international law" should be inserted at the end of article 21, paragraph 1 (b) (i).

28. Article 54 facilitated the coordination of the system of transfers to the court with that provided for under the treaties referred to in article 20 (e). Thus, a custodial State party to the statute which was a party to one of the treaties under article 20 (e), but which had not accepted the jurisdiction of the court with respect to the crime, was obliged either to extradite the suspect to a requesting State for prosecution or to refer the case to its competent authorities for the same purpose. While, generally speaking, the International Law Commission was justified in finding it difficult to impose an equivalent obligation on States parties for crimes under international law in articles 20 (b) to 20 (d) in the absence of a secure jurisdictional basis or a widely accepted extradition regime, it should be noted that the basis of the aut dedere aut judicare obligation was not the treaties referred to in article 20 (e), but article 54 of the statute itself.

29. Moreover, it was not clear whether in article 54, the requesting State to whom a suspect was to be extradited if the State party had not accepted the jurisdiction of the court with respect to the crime must be a State party, or whether the obligation to extradite extended to any State that made the request, whether it was a State party or not. The same question applied to the reference to "requesting State" in article 53, paragraph 2 (b). It seemed that those two provisions should be reconciled.

30. Article 23 (Action by the Security Council) continued to inspire reservations on the part of his delegation, which judged it unwise to import into the statute in such express terms the doubts and misgivings of many States about the exercise of powers under Chapter VII of the United Nations Charter, as long as constitutional questions remained unresolved concerning the place of the United Nations in the new world order, the respective roles of its two principal organs (the General Assembly and the Security Council), an increase in the membership of the Security Council, and the veto.

31. Guidelines should be established as to the circumstances in which the Council determined that there was a threat to international peace and security, in view of the binding and overriding character of such a determination by virtue of Articles 25 and 103 of the Charter. Indeed, a State's obligation under the statute to transfer every suspect to the court could be nullified if there were a contrary determination by the Council to surrender a given suspect to a particular State. For that reason, the best solution would be simply to delete article 23; or to delete article 23 and include in the preamble a clause preserving the functions and powers of the Security Council under the Charter; or to delete paragraph 1 of article 23 and amend paragraph 3 to ensure that a prosecution under the statute was prohibited only when the Council had taken action under Chapter VII of the Charter in relation to the relevant matter.

32. For him, article 35 was superfluous inasmuch as two other articles (24 and 34) provided an opportunity to ensure that the court's jurisdiction was confined to the purposes set out in the preamble. In any case, if article 35 were to be retained, it would be better to provide in article 34 that challenges to jurisdiction could also be made on the three grounds set out in article 35.

33. There also seemed to be a need to reconcile the provisions of articles 28 (Arrest) and 52 (Provisional measures) on provisional arrest. The statute was silent on the matter of how to proceed if a formal request had not been made within the time-limits prescribed. In that respect, although analogies with extradition could be misleading, it should be noted that under most extradition treaties, any suspect who had been provisionally arrested was entitled to be released if a formal request for extradition was not made within a specified period (usually 40 days).

34. His delegation had misgivings about the provision in article 33 (c) for the court to apply "to the extent applicable, any rule of national law". In its view, the application of the statute, the relevant treaties, and the principles and rules of general international law would leave very few lacunae to be filled by national law. In the first place, the treaties referred to in article 20 (e) all contained very full and clear provisions calling for the application of international law. Secondly, the commentary said that the expression "principles and rules of general international law" included "general principles of law, so that the Court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty". The court would apply the rules of national law in so far as those conformed with the general principles of law, and thus with general international law.

35. Finally, the distinction drawn in article 48, paragraph 1, between grounds of procedural error and errors of fact or of law was confusing in that a procedural error, which could be a simple breach of a procedural requirement or some form of procedural impropriety, was really an error of law. His delegation proposed that the reference to "procedural error" in article 49, paragraph 2, should be deleted and that the chapeau should be redrafted to read: "If the Appeal Chamber finds that the error of fact or law has vitiated the decision, it may ...", so as to bring the draft closer to article 25 of the Statute of the

International Tribunal on the former Yugoslavia, which was the better formulation.

36. Mr. ROTKIRCH (Finland), speaking on behalf of the Nordic countries, supported the proposal of the International Law Commission that a convention should be adopted on the basis of the definitive text of the draft articles on the law of the non-navigational uses of international watercourses. Indeed, that draft, which joined the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, concluded under the auspices of the Economic Commission for Europe (ECE) on 17 March 1992, together with many other international agreements regulating the rights and duties of riparian States along international watercourses, showed that environmental issues had become a predominant concern. The general principles contained in draft articles 5 to 10 combined the traditional idea of "optimal use" with the need to ensure the adequate protection of the watercourse environment. Focus was not only on a balanced development and equitable use of the watercourse as a natural resource between the watercourse States, but also on safeguarding the watercourse environment for the sake of future generations.

37. However, while viewing as realistic the framework convention approach adopted by the Commission, the Nordic countries feared that it might erode the binding character of the provisions of the draft. They were therefore particularly pleased to note that the draft articles had been presented in the form of a binding convention rather than as model rules. However, they viewed with some apprehension the wording of article 17 (Consultations and negotiations concerning planned measures), which was limited to calling on the States to arrive at "an equitable resolution of the situation" and to "pay reasonable regard to the rights and legitimate interests of the other State", since it provided no guidelines on how to proceed in case the differences persisted during negotiations. Nor did it mention the need to follow the equitable use and adequate protection standard of articles 5 to 8 during those consultations. The Nordic countries saw room for slight improvement there.

38. The draft articles presented a flexible normative framework, and much would be left dependent on the individual watercourse agreement; while not completely satisfactory, such a framework was the most appropriate in view of the wide divergences of the circumstances of particular watercourses. The concrete implementation of the broad terms of the convention would be delegated to the national authorities, including national courts.

39. Draft article 7, which set forth the general obligation of watercourse States to exercise due diligence in the use of international watercourses, also left it to them to adapt the content of that rule to their particular circumstances. However, the Nordic States supported the position taken in paragraph 2 of article 7, which made for a somewhat stricter standard of due diligence in requiring States to consult with each other if, regardless of the precautions they might have taken, their use of the watercourse had resulted in significant damage to it, and to discuss the modification of their use of it so as to eliminate or reduce all resulting damage, as well as payment of compensation when appropriate. The duty to consult might be made even stricter

in obliging the States to agree on a regime with the aim of preventing future damage or offsetting its consequences in the most effective way, thus following the model of the Trail Smelter arbitration, for instance by making a cross-reference to article 24 on "management".

40. While it might seem futile at the current stage to attempt to change the wording, efforts should be made, as far as possible, to harmonize the language of the draft articles with that of other relevant treaties.

41. In the view of the Nordic countries, the procedural obligations, such as exchange of information, notification concerning planned measures and consultations, set out in articles 11 to 19, were very useful in specifying the content of the State's due diligence obligation and, therefore, for determining its international responsibility.

42. As for article 20, on the protection and preservation of ecosystems, the concept which it advanced of "ecosystems of international watercourses" should definitely be explained in article 2. In addition, the Nordic countries suggested that the concepts of "best available technology" and "best environmental practices", introduced by the 1992 ECE Convention in specifying the duties of riparian States, should be included in the draft articles. Furthermore, the obligation of every State to carry out an environmental impact assessment should be expressly provided for in part IV of the draft. With regard to part V (arts. 27 and 28), the Nordic countries believed that the costs involved in action necessitated by the prevention or mitigation of damage should be equitably shared by the States concerned. With regard to article 32 on non-discrimination, its main principle - that watercourse States should give equal access to their judicial and other procedures without discrimination - should form the substance of an introductory sentence, even if that meant making provision in the main sentence for the case where the watercourse States concerned had agreed on a special regime for affirmative action in favour of some particularly vulnerable population.

43. As for article 33 on the settlement of disputes, his delegation saw no reason to deviate from the principle of compulsory arbitrational recourse to the International Court of Justice in the event that other modes of settlement had proved ineffectual. Consequently, it suggested deleting the words "by agreement" from paragraph (c) of that article.

44. Lastly, his delegation supported the position taken by the Commission in its resolution on confined transboundary groundwater, commending States to be guided by the principles contained in the draft articles on the law of the non-navigational use of watercourses, where appropriate, in regulating transboundary groundwater, since it was probable that the joint use of such waters would present problems analogous to those relating to international watercourses. The drafting of a new instrument on that issue could be considered, should that seem desirable in the light of an in-depth study of the factual and legal problems presented by the use of such waters.

45. Mr. HILGER (Germany) said he supported the Commission's recommendation regarding the elaboration by the General Assembly or by an international conference of plenipotentiaries of a convention based on the draft articles on the non-navigational uses of watercourses adopted by the Commission. The draft articles, which had been prepared in response to the need to establish rules in view of the increasing global need for water and the more than intensive use of international watercourses, had a number of merits.

46. First, they took adequate account of existing, proven regulations under international law, in line with the objective of creating as comprehensive a system as possible of mutually complementary global and regional regimes for international watercourses.

47. Second, they provided States with a normative framework for the use of international watercourses by setting a general minimum standard which would thenceforth apply to all international watercourses for which there had been no binding agreements to date. In addition, their broader definition of the term "watercourse" allowed not only the optimal use of a watercourse as a common resource but also its comprehensive and effective protection.

48. That basic approach did not, however, prevent States from taking account in specific agreements of the particular characteristics of each international watercourse and its specific uses. In that connection, the draft articles made it clear that such agreements must, in all circumstances, take account of use by all watercourse States, even if they had not themselves participated in the negotiations.

49. Furthermore, the draft articles established a level of protection allowing the use of a watercourse to be fairly assessed in accordance with the principle of equitable and reasonable utilization and participation and making it possible to reconcile conflicting interests. In that connection, Germany welcomed the Commission's decision to reject the controversial term "appreciable harm" in favour of the term "significant harm", thereby removing a potential source of dispute.

50. Lastly, the draft articles rightly reflected important environmental principles, such as the demand that international watercourses should be used and developed in a manner compatible with their adequate protection, the principle of limited territorial sovereignty and the procedural obligation to provide timely information and to hold consultations on planned measures regarding the utilization of water in an international catchment area.

51. As a whole, the draft articles represented a balanced system of regulations that would justify the convening of an international conference at which it should be possible to find acceptable solutions to outstanding or controversial questions and, if applicable, to consider the issue of confined groundwater.

52. Concerning the Commission's working methods, he said that the practice followed by the Commission in recent years of setting up working groups had the advantage of expediting exchanges of views and meant that the consideration of

an issue was more likely to be concluded in a reasonable time, as had happened with the draft statute for an international criminal court, and should therefore be maintained in the future. The question of State responsibility could usefully be considered in a working group during the Commission's forthcoming meetings. In conclusion, he welcomed the appointment of the two Special Rapporteurs for the topics "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons", respectively, which were both of great practical value and highly relevant.

53. Mr. YAMADA (Japan), referring to the draft articles on the law of the non-navigational uses of international watercourses, said that the question of confined transboundary groundwater was of critical importance for certain countries and its solution might require protracted deliberations. He therefore welcomed the Commission's decision not to deal with the question in the draft articles but rather to adopt a separate resolution in which it commended States to be guided by the principles contained in the draft articles, where appropriate, in regulating transboundary groundwater. None the less, he believed that, in view of the highly technical nature of the subject, which necessitated a thorough knowledge of the geographical and hydrological facts concerning such groundwater, the Commission should consider consulting specialists in the fields with which it was concerned, the cost of such services to be borne by the General Assembly.

54. With regard to the obligation of the State receiving notification concerning planned measures with possible adverse effects to communicate its response to the State providing the notification within a fixed period, he considered that the solution proposed in the draft articles offered a good compromise: on the one hand, article 13 provided for the possibility of extending the period for reply; on the other hand, article 16 provided for a kind of penalty for the notified State which failed to reply.

55. Since disputes concerning international watercourses would normally concern the question of "equitable and reasonable" utilization, it would be necessary to provide for procedures and mechanisms for amicable settlement by a third party on the basis of an evaluation of the uses in question. In that regard, he found article 33 entirely satisfactory.

56. Lastly, his delegation proposed that the General Assembly or an international conference of plenipotentiaries should commence the elaboration of a convention on the basis of the draft articles.

57. Ms. WILSON (United States of America) said she welcomed the fact that the approach adopted by the Commission in its draft articles on the law of the non-navigational uses of international watercourses was founded on the spirit of openness, cooperation and mutual consent that formed the basis for the numerous bilateral agreements the United States had entered into with its neighbours Canada and Mexico. In view of the growth in populations and the advance of industrialization, there was a critical need for States to cooperate in the utilization of water, which was a finite resource.

58. The keystone of the draft articles was article 5, which reconciled the aim of attaining optimal utilization of international watercourses and the duty to protect the watercourse in a framework of sustainable development. That clearly enunciated concept of equitable and reasonable utilization and participation permeated the remainder of the draft articles.

59. Article 7, which, together with articles 5 and 6, provided guidelines for the settlement of disputes based on reason, equity and cooperation must be understood in the context of the provisions contained in part III, concerning "planned measures", in part IV, concerning "protection, preservation and management", and in article 33, on settlement of disputes.

60. With respect to article 21, the commentary explained clearly that the idea of preventing, reducing and controlling pollution of a watercourse that might cause significant harm included the duty to exercise due diligence to prevent the threat of such harm. That provision was in harmony with United States legal standards.

61. With respect to articles 22 and 23, the commentary also explained carefully what was involved in the obligation to take all measures "necessary" to prevent the introduction of alien or new species into an international watercourse and to protect and preserve the marine environment, making it clear that that was not an open-ended obligation, but must be regarded as one of due diligence, having regard to the financial and technological capability of the watercourse States.

62. Article 32, which established clearly the concept and scope of non-discrimination, should help in the avoidance, or, failing that, the resolution, of disputes between States and private parties. It was also interesting to note that article 32 encompassed both judicial and other proceedings, thus facilitating participation in proceedings concerning potential harm to persons resulting from activities related to an international watercourse. In that regard, her delegation would have welcomed greater emphasis on the need for public participation in making decisions and resolving disputes related to watercourses, particularly in the articles dealing with State-to-State notification of planned measures and emergency situations.

63. Article 33, on settlement of disputes, and in particular the fact-finding mechanism, offered a simple and flexible approach in keeping with its objective.

64. Her delegation wholeheartedly endorsed the draft resolution on confined transboundary groundwater, and considered that almost all the provisions of the draft articles appeared to be applicable in the context of groundwater and to the settlement of disputes concerning groundwater issues.

65. It was legitimate to ask whether the draft articles must necessarily, as recommended by the Commission, lead to the elaboration of a convention, or whether there might not be other approaches more effective than a convention, particularly where that convention was not widely ratified. If, however, there was a preference for a convention, it should be elaborated by the General

Assembly rather than by a conference of plenipotentiaries, a solution that would be more expeditious and less costly. It would be necessary to fix a date during the 1995 session of the Assembly for a meeting of the experts, after which the Sixth Committee would then follow the procedure used for the Convention on Special Missions and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

66. Mr. CAFLISCH (Observer for Switzerland) said that, taken as a whole, the draft articles on the law of the non-navigational uses of international watercourses were of very high quality and could and should serve as the basis for a conference of plenipotentiaries. The Commission had rightly refrained from studying the legal regime of all confined water and including it in the draft articles. An extension of their scope to all confined water might exceed the Commission's mandate, create additional difficulties in an area that was already fairly complex, and give rise to a number of objections.

67. The Swiss Government found it difficult to grasp the legal nature of the instrument that the Commission had submitted to the international community. It took the form of a draft convention, but draft article 3 invited States to "apply" the provisions of the future convention and to "adjust" them "to the characteristics and uses of a particular international watercourse ...". In other words, States would be able to apply the convention, apply it in part, or rule out its application; furthermore, existing watercourse agreements would not be covered by the new convention, unless the parties to those agreements decided otherwise. It thus seemed, according to article 3, that the future convention was offered as a body of model rules. On the other hand, it contained no rules that States were bound to follow, except in the case of some provisions, notably article 4. In other words, the convention mapped out a framework that was largely lacking in normative force. Nor did it affirm that its provisions applied in the absence of treaty provisions, i.e. that they had residual force. The instrument was thus not a codification treaty. That did not mean that some of its provisions might not reflect existing customary law, as in the case of article 5, which corresponded to general contemporary practice. It could thus be concluded that the aim of the proposed convention was primarily a practical one: to suggest to watercourse States the adoption of certain rules without specifying their nature. If it had gone further, it would certainly have given rise to controversies that would jeopardize the objective sought. For that reason, and for that reason alone, the Swiss Government was ready to endorse the approach adopted by the Commission, while at the same time noting that normative clarity had been sacrificed to pragmatism.

68. Draft article 4 was a considerable infringement of States' freedom in respect of treaties, which one could no doubt attempt to justify on the grounds that the agreement in question concerned an object whose use was of interest to all the watercourse States. However, it would perhaps be better to address the issue under part III (Planned measures), and to accept, if necessary, that watercourse States which had concluded an agreement among themselves were responsible for any adverse effects of that agreement on other watercourse States. That approach would have the advantage of preserving States' freedom in

respect of treaties, while safeguarding the interests of third-party watercourse States.

69. Regarding article 7, his Government reserved the right to return to its earlier suggestion that the article should be deleted and that the factors to be taken into consideration in measuring the equitable and reasonable nature of utilization (see art. 6), should include the potential harm that might be caused by a new activity. However, he recognized that the new version of article 7 was a step in the right direction. It replaced an obligation of result - the obligation not to cause harm - by an obligation of conduct, the obligation to exercise due diligence. Moreover, the concept of "appreciable harm" had been replaced by that of "significant harm". Subsequently, the article introduced the concept of compensation. Finally, regarding the principle of equitable and reasonable utilization, the new version made it clear that the obligation not to cause significant harm, as set out in article 7, was subordinate to that principle.

70. Article 33 (Settlement of disputes) contained a disturbing oversight. It covered two types of dispute: disputes concerning a question of fact, and those concerning the interpretation or application of the future convention. The only procedure that could be initiated unilaterally was fact-finding, i.e., a procedure for the purpose of ascertaining the facts, and its results were not binding on the parties. The mediation and conciliation procedures could not be unilaterally set in motion, nor, even less so, could arbitration or judicial settlement. That was unfortunate with respect to one area, the allocation of natural resources, where disputes had been and would continue to be particularly frequent and significant.

71. Nevertheless, there was reason to commend the progress made in the sphere of legislation relating to international watercourses through the efforts of the Commission over the past 20 years. There was currently a clearer understanding than in the past of the elements that could and should constitute a watercourse agreement. Great strides had also been made towards identifying the relevant rules of customary law. It was now acknowledged that in the sphere of utilizations other than navigation, the basic rule was to attribute to each watercourse State an equitable and reasonable right of participation. It was also recognized that a State's new utilization of a watercourse could not be decided by that State alone, but required notification, consultation and negotiation if the new utilization might have significant adverse effects on the other watercourse States.

72. Mr. CALERO RODRIGUES (Brazil) said that the Commission had successfully taken up the challenge to submit draft articles on the law of the non-navigational uses of international watercourses, which was a universal instrument, despite the existence of innumerable watercourses, each having its own characteristics. That success was essentially due to the approach adopted, which was that of a framework agreement, leaving the general guidelines to be completed by watercourse agreements which might "apply and adjust the provisions ... to the characteristics of a particular international watercourse or part thereof" (art. 3, para. 1).

73. While, as a whole, the draft articles adopted on second reading did not depart much from the 1991 draft, he noted that the relationship between article 5, on equitable and reasonable utilization, and article 7, on the obligation not to cause significant harm, had been fundamentally modified. On first reading, the Commission had taken the view that a State's right to utilize an international watercourse in an equitable and reasonable manner was limited by the obligation not to cause significant harm to other watercourse States. On second reading, it had taken the view that in certain [unspecified] circumstances, "equitable and reasonable utilization" of an international watercourse might still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remained the guiding criterion in balancing the interests at stake. Article 5 had been left untouched, but article 7 had been changed. In the present version, the text merely laid down the obligation to exercise due diligence in such a way as not to cause harm.

74. If a State were under an obligation not to cause harm, and it caused harm, its international responsibility would be engaged, giving rise to obligations of cessation and reparation. However, if the State was only under an obligation of due diligence, causing harm would not entail its responsibility, unless it had failed in the exercise of due diligence. However, the question arose of what would happen if, despite the exercise of due diligence, harm was nevertheless caused. The rules of State responsibility could not be applied, because the State had not breached its obligation of due diligence. It would be possible to invoke the rules of international liability for injurious consequences arising out of acts not prohibited by international law, but for that to be possible, the Commission would have to conclude its work on that instrument.

75. The new version of article 7 attempted to deal with the problem of the consequences of harm caused despite the exercise of due diligence, although a careful study of its provisions revealed that the only obligation therein established was the obligation to enter into consultations with the State suffering such harm. If those consultations failed, the State which had caused the harm was free from any other obligation under the article.

76. While it was possible to admit that, in certain cases, equitable and reasonable utilization should prevail over the no harm principle - as was already the case where the harm caused was below the threshold of "significant" - it was regrettable that no upper limit was established, and that as a result a State might suffer very substantial harm. A dual approach might be adopted: the strict obligation not to cause harm (the first version of art. 7) would be maintained in relation to harm above a new threshold, higher than the present "significant" level, while for harm below that threshold, there would be a less stringent obligation, the obligation to exercise due diligence. In that case, compensation should be provided, under terms to be agreed between the States concerned.

77. The delegation of Brazil believed that too much emphasis had been given to the concept of equitable and reasonable utilization, a notion that for legal purposes was too subjective and theoretical. His delegation also regretted that

the useful distinction between contiguous and successive rivers had been abandoned. Nor could his delegation understand why the idea of "participation" had been introduced into article 5, paragraph 2, nor what was actually meant by the distinction between "management" (art. 24) and "regulation" (art. 25), as regulation was a particular form of management.

78. Notwithstanding those reservations, his delegation was prepared to join the broad consensus that seemed to exist on the merits of the proposed instrument. It favoured the elaboration of a convention which would be entrusted to a working group of the Sixth Committee in which experts could participate.

79. Ms. DAUCHY (Secretary) said that Argentina, Bolivia, Honduras, Lithuania, Niger, Panama, San Marino and Senegal had become sponsors of draft resolution A/C.6/49/L.3, on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization.

The meeting rose at 6 p.m.